Petition

81-2039

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In the Supreme Court of the United States

October Term, 1982

No.

UNITED STATES OF AMERICA,
Respondents

v.

NICK DeLUCIA, III,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether Certiorari should be granted in this case to determine whether the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of this court in *Franks v. Delaware* in that the affidavit of probable cause contained false and misleading information which went to the heart of the probable cause and which the Affiant knew to be false.**

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REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

OPINION OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

The opinion of the Honorable Gustave Diamond was made orally in response to Petitioner's written motion to suppress and is contained in relevant parts in the appendix hereto.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

The Third Circuit, at No. 81-1448, in a Judgment Order issued January 20, 1982, affirmed the Judgment of the District Court. This Judgment Order is contained in the appendix hereto.

JURISDICTION

The Judgment sought to be reviewed by this Court was issued by the Court of Appeals on January 20, 1982. The determination of the Court of Appeals denying Petitioner's request for rehearing was made on March 8, 1982.

Jurisdiction of this Court to review the determination of the United States Court of Appeals for the Third Circuit is given by 28 U.S.C. §1254(1). This petition is being made by the Defendant in the cause below, a party to the said action.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

... and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner in this case, Nick DeLucia, III, was found guilty of two counts of tax fraud on December 15, 1980.

Most of the evidence came directly from or was derived from a search of a massage parlor, The Maya of Market Square in Pittsburgh, PA, that was made several months before the indictment.

Petitioner, prior to trail, had filed a motion to suppress evidence, which was denied.

During the time set for pre-trial arguments, Appellant Nick DeLucia filed affidavits, pursuant to instructions in the case of *Franks v. Delaware*, 438 U.S. 154 (1978), seeking a broader suppression hearing, alleging that the affidavit of probable cause contained vital information which the affiant knew to be false. The lower court denied appellant's request for a *Franks v. Delaware* hearing.

The lower court's ruling was affirmed on appeal to the Third Circuit and rehearing was denied.

B. Facts

The search warrant in this case authorizes a search of the Maya of 24 Market Square to find evidence of "interstate transportation in aid of prostitution" (18 U.S.C. §1952) and "white slave traffic" (18 U.S.C. §2422). The affidavit is very long and contains a great deal of information.

In the instant matter, a general reading of the affidavit of probable cause might leave one with the impression that prostitution is going on both at the Maya (the place searched) and the Gemini and, therefore, a search of either place would possibly yield evidence of same. This impression would be based on three things: first, that informant no. 1 told affiant that someone told informant no. 1 that there was sexual intercourse at the Maya (informant no. 1 had no personal knowledge of this), second, that informant no. 2, a former employee, told affiant there was "sexual contact" (not intercourse) there, and that customers told affiant that they used their credit cards for prostitution and non-prostitution "at the Gemini and/or the Maya."

This information is false, known to be false by the affiant and goes to the heart of the probable cause. Petitioner submitted affidavits to the Court, pursuant to the instructions of *Franks, supra,* in an effort to obtain a hearing regarding the falsehoods and omissions. This was denied by the District Court.

One affidavit was filed by "informant no. 2" who is relied upon by the affiant for the statement that sexual contact occurred at the Maya. Her affidavit, however, tells us that while she told the affiant that nude rubs were given, she also told him that there was absolutely no sexual intercourse at the Maya and that employees would be fired for engaging in sexual intercourse at the Maya. She did not merely say that *she* didn't engage in sexual intercourse at Maya, but that no one did.

Further, in the affidavit filed by Petitioner's attorney, Paul D. Boas, in support of a *Franks* hearing, it was stated that the government had interviewed many customers and other employees and witnesses prior to the issuance of the warrant, all of whom told the government and the affiant that while there may have been sexual intercourse at the Gemini there simply was no sexual intercourse or prostitution at the Maya, the place to be searched. Incidentally, this fact became obvious at trial, prompting Petitioner to file a motion to reconsider motion to suppress in light of evidence adduced at trial which was also denied.

In other words, the affiant clearly and intentionally misled the magistrate through the use of false statements and by omitting material statements, into the belief that there was prostitution going on at Maya of Market Square when the affiant knew that this was not true.

Petitioner, in his affidavits, informed the court that the government, in essence, was well aware that prostitution never occurred at the Maya, which was the place searched for evidence of "interstate prostitution and white slave traffic," and

that the government, intending to mislead, used the term "sexual *contact*" rather than intercourse when referring to *Maya* so as to avoid the word intercourse but to leave the magistrate with the same impression. Further, the government, knowing full well that there was no prostitution at the Maya, the place to be searched, referred to the use of credit cards by customers for prostitution and non-prostitution at the Gemini *and/or* the Maya, to intentionally misled the magistrate into believing credit card customers told the affiant they obtained prostitution at the Maya when the affiant knew this was false.

The Court below, concluding that since the affiant stated, without any factual support whatsoever, that the *Maya* also served as corporate headquarters, records of prostitution from other places might reasonably be expected to be found there, thus negating the necessity to get into the *Franks v. Delaware* issue.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *FRANKS V. DELAWARE* IN THAT THE AFFIDAVIT OF PROBABLE CAUSE CONTAINED FALSE AND MISLEADING INFORMATION WHICH WENT TO THE HEART OF THE PROBABLE CAUSE AND WHICH THE AFFIANT KNEW TO BE FALSE.

The search warrant in this case sought evidence of interstate prostitution and white slave traffic. Further, it sought to find this evidence by searching Maya of Market Square at 24 Market Square, Pittsburgh, PA. In the unsworn to portion of the warrant, the affiant calls this address the corporate headquarters of DeLucia Enterprises, but offers no evidence or information to support this statement.

For these purposes, Petitioner assumes that the affidavit, on its face, satisfies the probable cause requirement in that it implies in several parts that interstate prostitution was occurring at the Maya, the place to be searched. However, Petitioner alleged during the pre-trial hearings by affidavits, that the affidavit of probable cause contains false statements known to be false by the affiant and which are necessary to the finding of probable cause.

When this is the case, a search warrant, even though valid on its face, cannot survive. *Franks v. Delaware*, 438 U.S. 152, 98 S.Ct. 2674 (1978). As this court held in that case:

> When the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a *truthful* showing. *Franks, supra*, at 164.

It goes on to hold at 165:

> It would be an unthinkable imposition upon his [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

In the instant matter, Petitioner sought to raise this issue pre-trial by briefing the issue, and by submitting affidavits in support of its position, as the high court in *Franks v. Delaware, supra*, at 171-172 mandates.

The affidavits that Petitioner submitted were from Attorney Paul D. Boas, counsel for Petitioner, and Darlene Ambrose, a former employee of DeLucia Enterprises, and the individual in the affidavit identified as "informant number two".

The affidavit of Attorney Boas essentially states that the government knew at the time of the issuance of the search warrant, from having interviewed a number of witnesses (customers and employees) that there was no sexual intercourse

being carried on at the Maya of 24 Market Square. The government knew that the so-called "sexual contact" that informant no. 2 talks about going on at the Maya was simply hand massage or hand "relief", which is perfectly legal. The government knew, when it stated in the affidavit that there were customers who received "hand relief and/or prostitution...at Gemini Spa or Maya of Market Square," that the customers it interviewed from Gemini may have told of prostitution, but the Maya customers only told of hand relief.

Further, the affidavit of Darlene Ambrose who is informant no. 2, states uncategorically that she told the affiant that there was no prostitution or sexual intercourse at the Maya, that she gave nude rubs only and that the employees were told that if they engaged in sexual intercourse, they would be fired.

The importance of these points are obvious.

If there was no prostitution at the Maya, the place to be searched, and the affiant knew this, yet intentionally misled the magistrate by stating and implying the opposite in her affidavit, this clearly goes to the heart of the probable cause.

The lower court's reasoning that evidence of prostitution at the place to be searched is unnecessary to a finding of probable, because the affiant stated in conclusory fashion that the Maya was corporate headquarters and other massage parlors did have prostitution does not eliminate the problem. The Lower Court opined as follows:

> I don't think that it matters that the Maya of Market Square did or did not engage in active prostitution.
>
> I believe that there is sufficient bases for finding that DeLucia Enterprises, Inc. did, and that records of DeLucia Enterprises, Inc. would reveal, or would have information concerning, *inter alia*, prostitution activities.
>
> So for that reason, I believe that a *Franks v. Delaware* theory is unnecessary, and we will proceed from there. (See Appendix A)

Petitioner, of course, contends that a *Franks v. Delaware* theory is *not* unnecessary. Petitioner contends that the affiant intentionally or with a reckless disregard for the truth misstated material information and left out material information. Petitioner contends that the government knew and believed at the time of the affidavit that there was not prostitution, interstate or otherwise, at the location of the search. Petitioner contends that if the truth and facts as affiant knew them to be were in the affidavit in terms of what informant no. 2 (Darlene Ambrose) and others told the affiant, there would be no probable cause.

As such, the decision of the Circuit, affirming by Judgment Order the lower court, is not in conformity with the decision of this Court in *Franks v. Delaware, supra.* As such, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

.....
CARL MAX JANAVITZ

.....
PAUL D. BOAS

Attorneys for Petitioner

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

NICHOLAS A. DeLUCIA, JR.,
NICHOLAS DeLUCIA, III,
RICHARD MARCHESE,
CHERYL SCHMIDT,
PAUL DELUCA,
THOMAS DESSELL,
ROBERTA QUALLICH,
JOSEPH DeLUCIA,

Defendants

No. 80-24
Criminal

WEDNESDAY, APRIL 9, 1980
PITTSBURGH, PENNSYLVANIA

BEFORE: Honorable Gustave Diamond, J.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY
TAKEN IN THE ABOVE-CAPTIONED CASE BY:

Michael D. Powers
Official Reporter

In this case, the affiant stated that he was an officer, that he was an agent of the Internal Revenue Service, that he had been so for ten years. That he had examined the corporate records, as well as the books and records, of—or some of them—of DeLucia Enterprises, Inc. That he personally had done that. And he stated that DeLucia Enterprises, Inc. was a corporation which had several businesses, including Gemini Spa, Maya of Market Square, Scandinavia Spa, as integral parts.

He stated under oath that the address of Maya and DeLucia Enterprises was 24 Market Square, which was the place that he sought to have searched.

I believe, from those facts, the magistrate was properly or certainly within her proper exercise of her function in concluding that the corporate address and headquarters was 24 Market Square. And that this was based on the agent's examination of the corporate records.

The magistrate happens to be a lawyer, and I think it is common knowledge among lawyers that corporate records indicate the corporate headquarters. As a matter of fact, some of those records are required to indicate the corporate headquarters.

So, I do not believe that considering the standards suggested by the Court in Ventresca, that a common sense reading of the affidavit would not result in a finding that there was sufficient basis for a finding that there was probable cause to believe that DeLucia Enterprises, Inc. was located at 24 Market Square.

There were other statements made in the affidavit. The agent indicated that he had been examining records for ten years and that it was common that business records were maintained on the premises.

I believe that the magistrate would have been reasonable in concluding that this was a statement of an expert, even if

common sense did not dictate that business records are maintained on the premises of the business.

In addition, the agent stated in the affidavit that he had personally discussed the matter of the preparation of the tax returns of the corporation with the preparer of those tax returns. And that that person indicated that he received his information from Nick DeLucia, Jr., and that presumably—and I think it would be a fair inference that these records of DeLucia Enterprises were maintained, in connection with the tax matters, were maintained at 24 Market Square.

With that conclusion, I don't think that it matters that Maya of Market Square did or did not engage in active prostitution.

I believe that there is sufficient basis for finding that DeLucia Enterprises, Inc. did. And that the records of DeLucia Enterprises, Inc. would reveal, or would have information concerning, inter alia, prostitution activities.

So, for that reason, I believe that a Franks v Delaware theory is unnecessary, and we will proceed from there.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1448

UNITED STATES OF AMERICA

v.

NICHOLAS A. DeLUCIA, JR.
RICHARD MARCHESE
PAUL DELUCA
NICK DeLUCIA, III
THOMAS DESSELL
JOSEPH DeLUCIA
ROBERTA QUALLICH
CHERYL SCHMIDT

NICK DeLUCIA, III, *Appellant.*

(Criminal No. 80-00024-04—W.D.Pa.—Pittsburgh)

SUBMITTED UNDER THIRD CIRCUIT RULE 12(6)
JANUARY 19, 1982

BEFORE: SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges.*

Judgment Order

After consideration of the contentions raised by appellant, to-wit, that the lower court erred (1) in failing to suppress the evidence, as a result of an invalid search warrant and (2) in failing to grant relief from prejudicial joinder of offenses, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ SEITZ
Chief Judge

Certified as a true copy and issued in lieu of a formal mandate on March 11, 1982.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

DATED: January 20, 1982

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1447
No. 81-1448

UNITED STATES OF AMERICA

v.

NICHOLAS A. DeLUCIA, JR., RICHARD MARCHESE, PAUL DELUCA, NICK DeLUCIA, III, THOMAS DESSELL, JOSEPH DeLUCIA, ROBERTA QUALLICH, CHERYL SCHMIDT

NICHOLAS A. DeLUCIA, JR., Appellant in No. 81-1447
NICK DeLUCIA, III, Appellant in No. 81-1448

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: March 8, 1982